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No. 263.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

CITY OF SAN ANTONIO, *et al*, APPELLANTS,

VERSUS

SAN ANTONIO PUBLIC SERVICE COMPANY,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF TEXAS.

Reply Brief for Appellants, Defendants Below.

R. J. McMILLAN,
Solicitor for Appellants.

CLAUDE V. BIRKHEAD,
City Attorney.

TERRELL, DAVIS, HUFF & McMILLAN,
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LODOVIC PTG. CO., SAN ANTONIO.

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Appellees, on page 11 of their brief, raise some question as to our citations from the City Charter, stating that Subdivision Fourth (4th) of Section One (1), Article One (1), is not contained in the statement of the evidence, or the

Master's or the Court's findings. The agreed statement of the evidence, on page 124 of the Transcript of the Record, contains the following:

> "The parties hereto further agree that the Charters of the City of San Antonio in effect March 16, 1899, and July, 1917, having been declared by their terms public acts, properly certified copies of same may be considered by the court without the necescity for copying said Charters in their entirety in this agreed statement of the evidence."

In view of this stipulation, Appellants feel that their action in copying any portion of the City Charter applying to this case is entirely warranted, provided certified copies of same are filed with the court.

We further desire to direct the court's attention to another provision of the City Charter, which was contained in the Charter at the time the franchise of 1899 was granted and a similiar provision which was contained in the Charter when the 1917 Consolidation Ordinance was passed. Sections 42 and 57 of the Charters in effect in 1899, read as follows:

> "Sec. 42. The City Council shall have the care, management and control of the City and its property and finances; and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this State, and such ordinances to alter, modify or repeal, and shall have power by ordinance:"
>
> "Sec. 57. To have the exclusive control and power over the streets, alleys, sidewalks, lanes, avenues and public grounds and highways of the City and to abate and remove encroachments or obstructions thereon; to open, alter, widen, straighten, extend, establish, abolish, regulate, grade, re-grade, clean, pave, macadamize or otherwise improve the same;

to put drains and sewers therein and to prevent the encumbering thereof in any manner, and to protect the same from any encroachments or injury."

Sections 51 and 90 of the City Charter in effect in 1917, in so far as they apply to the issue at bar, are as follows:

> "Section 51. * * * The Board of Commissioners shall have the care, management and control of the City, its property and finances, and shall have power to enact, ordain, alter, modify or repeal any and all ordinances not repugnant to this Charter and the constitution and laws of the State, and shall have power, by ordinance:"
>
> "Section 90. * * * To have the exclusive control and power over the streets, alleys, sidewalks and public grounds and highways of the City, and to abate and remove encroachments or obstructions thereon."

Section 99 of the Charter in effect in 1899 and Section 94 of the Charter in effect in 1917, contain the following:

> "Section 94. * * * To direct and control the laying and construction of the railroad and street railway tracks, turnouts and switches and prohibit the same in the streets, avenues and alleys, and regulate the location of depot grounds within the City;"
>
> "Section 99. "To direct and control the laying and construction of railroad tracks, turnouts and switches, or prohibit the same in the streets, avenues and alleys, and location of depot grounds within the City;"

We especially call the court's attention to these Sections of the Charter for the reason that the Texas Appellate Courts have given extremely broad significance to these provisions and the rights of the City thereunder. See Green vs. City of San Antonio, 138 S. W., 7; Peters vs.

City of San Antonio, 195 S. W., 989; Craddock vs. City of San Antonio, 198 S. W., 634.

The Sections of the Charter quoted, are particularly pertinent with regard to the City's right to make the contract, in view of the decision of the Supreme Court in the case of Mayor *et al* vs. Houston Street Railway, 83 Tex., 548. In that instance, the City of Houston had in its Charter a provision practically identical with the Charter provision above quoted, to-wit, that the City Council should have exclusive control and regulation of all streets, etc., within the corporate limits, and the right to direct and control the laying and construction of railway tracks, etc. In discussing that provision of the Charter the Supreme Court said in that case they were of the opinion that by its terms (as well as by the terms of the Charter to the Street Railway Company), the Legislature intended to, and did confer ample authority upon the City Council to grant the franchise, and that said grant having been duly accepted, became a vested right or perfect contract.

See also Case of Shreveport Traction Company vs. Shreveport, decided by the Supreme Court of Louisiana, 47 S. W., 40; 129 Am. State Reports, 345, where the court upholding a franchise agreement of this character says:

> "There is no express legislation in this State authorizing municipalities to establish rates for street railroads by contract or agreement. But such power necessarily flows from the statutory prohibition that no railroad shall be constructed through the streets of any incorporated city without the consent of the municipal council thereof, and from the general power of regulating the use of streets: Rev. Stats. 1870, sec. 689; Act No. 131, p. 184, of 1855, sec. 7; Brown vs. Duplessis, 14 La. Ann., 842; Forman vs. New Orleans & C. R. R. Co., 40 La. Ann., 446, 4 South., 246."

There is nothing in the Statutes of the State of Texas, in the Charter of the City of San Antonio, or in the Constitution of the State, prohibiting the City from making a contract of this kind, unless Section Seventeen (17), of Article One (1), of the State Constitution be so construed. We have in our original brief discussed the reason why such construction should not be placed upon that provision of the Constitution. Appellees, in their brief, take the broad position that Section 17 makes the attempted contract absolutely void. They cite no authority for this, and it seems clear to us that such is not the effect.

The constitutional provision is simply a reservation of power to the State, and is not an absolute prohibition against the making of contracts of this character. If such were the fact, the contracts upheld in the various Ohio cases by this court would have been void, for the Constitution of Ohio contains a provision so nearly identical with the Texas Constitution as to be almost the same. Section Two (2) of Article One (1), of the Ohio Constitution, as adopted in 1851, is as follows:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed, by the general assembly."

For convenience, we re-copy Section 17, of Article 1, of the Texas Constitution:

> "No irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof."

If Appellee's contention be correct, it is difficult to understand the decision of this court in the Cleveland case and the Columbus case. A very similar provision is contained in the Constitution of the State of Michigan, despite which fact, this court sustained the franchise contract in the Detroit case.

Appellee attempt to appropriate the case of Galveston Railway Company vs. City of Galveston, 90 Tex., 398, as their own, and boldly assert that it is authority for their position. We submit to the court a close inspection of this decision, will show that it is against them. It must be borne in mind that the Supreme Court was there dealing with a Steam Railway, and not a Street Railway Company. Steam Railroads unquestionably receive their authority to go upon streets of cities and towns from the Legislature. The Legislature, as shown by the opinion in the case, had passed a statute providing that the tracks could only be laid upon city streets with the consent of the municipal authorities. This was merely a concession from the Legislature to the cities and could be granted or withdrawn as the Legislature saw fit. The original source of authority in the premises was, however, the Legislature, and not the city. In the case of Street Railways, however, the Legislature cannot grant the right, in Texas, for them to go upon the streets of a city without the consent of the city authorities, because of the prohibition contained in Section 7 of Article 10, of the State Constitution. It is true, as stated by this court in the Altgelt case, that there is nothing in that provision to prevent the Legislature from chartering the Street Railway, provided the consent of the city can be obtained, but the Legislature's authority in the premises is absolutely limited by the constitutional provision. Accordingly, the right to occupy the streets of the city being solely dependent upon the action of such city, the latter

may, in granting its consent, prescribe terms for the breach of which the right granted may be forfeited. This was the construction placed upon the Galvestion decision by the Court of Appeals in the Athens Telephone case; and as stated in our original brief, a writ of error was denied by the Supreme Court. This decision was a matter of great import to the State of Texas, and vitally affected the substantive law of this State. Had the Supreme Court of Texas not endorsed this construction of the Galveston case, a writ of error would most certainly have been granted. The Athens case has been followed a number of times by very late decisions in our courts, the same interpretation being given in each instance. In a late case, not cited in our original brief, Texas Telephone Company vs. City of Mart, 226 S. W., 497, it is followed again by one of the Texas Courts of Appeal, and cited with approval. The Mart case is also a rate case. Counsel for Appellee are disposed to quarrel with the decision in the Athens case, and express their personal opinion that it is not the law of the State, and that it does not correctly construe the Galveston case. It is idle for counsel to question what the courts of last resort mean in the face of their very clear statements of what they hold to be the law.

Passing to another point, appellee contend that even should it be held that the City had the right to make this contract, same was subject to be determined by the action of the Legislature, and the Legislature having acted by passing the Half Fare Law, the contract was abrogated. Should this be held to be the case, we call the court's attention to the fact that the Half Fare Law was passed in 1903, and complainant's predecessor, after litigating the matter out with private individual, to-wit, George Altgelt, acquiesced in that law until 1917.

In 1917, the Consolidation Ordinace was applied for and accepted. The effect of this Ordinance has been fully argued in the main brief. Since the passage and acceptance of this Ordinance, no action tending to change same or the contract engendered thereby, has been taken either by the City or the State. Accordingly, Appellee are in the same position, having re-bound themselves since the passage of the Half Fare Law, as they would be if same had never been passed. This phase of the matter is discussed in the Manitowoc case, 129 N. W., 925, which decision is mentioned and discussed by this court in Milwaukee Railway & Light Company vs. Railway Commission of Wisconsin, 238 U. S., 174.

Passing to another point, Appellee states, under its subdivision three (3), on pages 40 and 41 of their brief, that Section 17 of Article 1, applies to the City of San Antonio after it became a Home Rule City. In this, Appellee's counsel is in error. Section 17, Article 1, of the State Constitution, applies only to the State Legislature. It specifically states that all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof. Since the passage of the Home Rule Amendment to the Texas Constitution, the Home Rule Cities of Texas do not derive any authority from the Legislature. This is clearly shown by the decision in Xydias Amusement Company vs. City of Houston, 185 S. W., 415, an excerpt from which is cited to this court in our main brief. Section 17, is a limitation upon the Legislature, and those acting under its authority, only, and is not a limitation upon Home Rule Cities. There is nothing in the Constitution of Texas, as it now exists, to prevent any Home Rule City, which derives its authority directly from the sovereign people, granting any irrevocable or special privilege or immunity, if it desires to do so. The

provision in the Home Rule Amendment to the Constitution which says no ordinance or charter shall contain any provision inconsistent with the Constitution of the State, is not offended against, as there is no such inconsistency. The only provision against such a grant is limited, as shown above, to the Legislature and those acting under its authority.

Appellants here now pray as they have heretofore prayed in their original brief on file herein.

Respectfully submitted,

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Solicitor for Appellants.

CLAUDE V. BIRKHEAD,
City Attorney.

TERRELL, DAVIS, HUFF & McMILLAN,
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